43/15

FILED
SEP 1 1955
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 369

PASQUALE PAGANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BERNARD TOMPKINS,
Attorney for Petitioner,
165 Broadway,
New York, N. Y.

VICTOR J. HERWITZ, Esq.,
522 Fifth Avenue,
New York, N. Y.

VINCENT J. VELELLA, Esq.,
5 Beekman Street,
New York, N. Y.

Of Counsel for Petitioner.

INDEX

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	11
Appendix A—Opinion and Judgment Below	1A

CITATIONS

Cases:

Babb v. *U. S.*, 218 F. 2d, 538 (5th cir.)	9
Choctaw & M. R. Co. v. *Newton*, 140 F. 225 (8th cir.)	8
Krulewitch v. *U. S.*, 336 U. S. 440	7
Mellon v. *U. S.*, 170 F. 2d, 583 (5th cir.)	8
Minkow v. *U. S.*, 5 F. 2d 319 (4th cir.)	8
Spurr v. *U. S.*, 87 F. 701 (6th cir.)	9
Toner v. *U. S.*, 173 F. 2d 140 (3rd cir.)	7
U. S. v. *Hall*, 178 F. 2d 853 (2d cir.)	8

STATUTES

Title 18, U. S. Code, Sec. 201; 1948, C. 645, 62 Stat. 691	1, 3, 4
Title 18, U. S. Code, Sec. 371; 1948, C. 645, 62 Stat. 701	1, 4

MISCELLANEOUS PAGE

1 Wharton's Criminal Evidence, Sec. 331 8
3 Wigmore on Evidence (3d ed.) Secs. 896, 900 8
4 Wigmore on Evidence (3d ed.) Sec. 1124 8
5 Wigmore on Evidence (3d ed.) Sec. 1618 8

IN THE

Supreme Court of the United States

OCTOBER TERM 1955

No. .....

PASQUALE PAGANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Pasquale Pagano, petitioner, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on July 5, 1955, which affirmed a judgment of conviction after a trial in the United States District Court for the Southern District of New York before the Honorable Lawrence E. Walsh, District Judge, and a jury, and a sentence of five years for conspiring to bribe a government tax official in violation of 18 U. S. C. Sec. 371, to run consecutively with concurrent sentences of three years each for offering and for paying such bribe in violation of 18 U. S. C. Sec. 201.

Citations to Opinion Below

The opinion of the Circuit of Appeals, printed in Appendix A hereto, is not yet reported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on July 5, 1955 (App. A, *infra*, p. 1a).

On August 3, 1955 the Honorable John M. Harlan, Associate Justice of the Court, granted petitioner's application for an order extending his time to file a petition for a writ of certiorari to and including September 2, 1955.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1) and Rule 22 (2).

Questions Presented

Question I.

(a) Agostino Mauro, who was named in the indictment as the co-defendant and alleged co-conspirator of the petitioner, was called by the government as its witness, and at the very outset of his direct examination, was permitted to testify, (over petitioner's objection) that he had already pleaded guilty to the charge of conspiracy which had been made against him and the petitioner. Was this ruling correct?

(b) If Mauro's plea of guilty was received solely for its bearing on his credibility, was the ruling correct?

Question II.

The Government was permitted over petitioner's repeated objections to inform the jury that the petitioner had been arrested following his indictment by a federal

grand jury on a charge of conspiracy to violate the narcotics laws. This highly prejudicial fact was injected into the case by the prosecutor's asking all of the petitioner's character witnesses whether they had ever heard of petitioner's arrest and indictment for the narcotics violation. These questions were allowed despite the fact that the narcotics arrest and indictment had occurred subsequent to the dates of the commission of the crimes charged in the instant case. Did this action by the Government, allowed by the trial court, and approved by the Circuit Court of Appeals, meet the established standards for a fair trial in the federal courts?

Statutes Involved

TITLE 18, UNITED STATES CODE. Sec. 201. *Offer to Officer or Other Person.*

"Whoever promises, offers, or gives any money or thing of value, or makes or tenders any check, order, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or

omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both."

TITLE 18, UNITED STATES CODE. Sec. 371. *Conspiracy to commit offense or to defraud United States.*

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Statement of Facts Material to the Questions Presented

I.

The petitioner was charged (R. 3a-5a) with conspiracy to bribe a United States government tax official in violation of 18 U. S. C. Sec. 371 (1948, C. 645, 62 Stat. 701) and with offering and paying such bribe in violation of 18 U. S. C. Sec. 201 (1948, C. 645, 62 Stat. 691). The jurisdiction of the District Court was invoked because the case arises under the United States Criminal Code.

The Government's principal witness was one Agostino Mauro who had been named in the indictment as the petitioner's co-defendant and alleged co-conspirator (R. 3a-5a). But Mauro's testimony (R. 15a-42a) constituted almost a categorical denial of the existence of the conspiracy charged, as he testified among other things, in substance, as follows:

1. The petitioner never gave him any money or authorized him to give or offer any money to any government

official at any time (R. 32a, 33a, 42a). The petitioner never gave Mauro any money at all (R. 33a, 42a).

2. When Mauro went to see the government agent whom he and the petitioner allegedly conspired to bribe, Mauro had no intention of offering him any money (R. 37a).

3. The petitioner never asked Mauro to make a deal of any kind with the government agent (R. 36a).

4. Mauro further testified that he had relayed the government agent's bid for a bribe to the petitioner, who had rejected the whole idea as "ridiculous" (R. 33a, 34a).

Although Mauro's testimony constituted a complete repudiation of the charge of conspiracy, the effect that repudiation was destroyed. This was accomplished by permitting the government, at the very outset of Mauro's direct examination, to bring out, over petitioner's objection, that he (Mauro) had already pleaded guilty to having conspired with the petitioner to bribe a government tax offiicial (R. 16a). After proof that Mauro had pleaded guilty to conspiracy it was improbable to expect the jury to credit his virtual denial that a conspiracy in fact had ever existed.

The Court of Appeals below held that Mauro's testimony as to his plea of guilty was perfectly proper, even on direct examination, because the evidence was received for its bearing on the credibility of the witness (App. A, *infra*, p. 5a). Whether the evidence tended to impeach or support Mauro's credibility was not made clear.

II.

The terminal date of the crimes charged in the indictment herein was June 23, 1954 (R. 3a-5a). Nevertheless, the Government, over petitioner's objection, was permitted

to ask each of the petitioner's six character witnesses on cross examination if they knew that the petitioner had been arrested June 30, 1954 following his indictment by a Federal Grand Jury on a charge of conspiring to violate the narcotics laws (R. 73a, 79a, 90a, 95a, 114a). Typical of the questions put to the witnesses are those addressed to the witnesses Barba and Velella set forth below:

Barba was asked (R. 73a):

> "Q. * * * have (you) ever heard that on June 30th of 1954, this year—have you heard that on that day, this defendant, Pasquale Pagano, was arrested in this court * * * for a conspiracy to violate the narcotics law?"

Velella was asked (R. 114a):

> "Q. How many people in the community can you tell us, have heard that he (Pagano) was arrested on June 30th of 1954 for conspiracy to violate the narcotics law?"

Petitioner's objections to this line of questioning were over-ruled and the Court gave no contemporaneous instructions to the jury as to any limitations to be placed upon their consideration of this testimony (R. 73a, 79a, 90a, 95a, 114a).

The Court of Appeals placed its stamp of approval on this type of character witness cross-examination (with all its devastating prejudice) by its holding that "the questions addressed to the first character witness (Barba) were obviously proper," (App. A., *infra*, p. 6a) and that "the trial was conducted throughout with a scrupulous regard for the protection of the appellant's rights" (App. A., *infra*, p. 9a).

Reasons for Granting the Writ

This Court, in the exercise of its judicial discretion ought to grant this petition for a writ of certiorari for the special and important reasons set forth below:

I.

The Court of Appeals in the case at bar has rendered a decision which sanctions rulings by a lower court which constitute departures from the accepted and usual course of judicial proceedings. These departures were as follows:

(a) The decision of the court below that it is proper to bring out that a co-defendant and alleged co-conspirator has pleaded guilty is a departure from the accepted and usual course of procedure in judicial proceedings, that the guilt or innocence of a defendant must be determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else (*Toner* v. *U. S.*, 3d cir., 173 F. 2d 140). It is also a departure from the accepted and usual course of procedure in cases of conspiracy whereby only the acts and statements of a co-conspirator in furtherance of the conspiracy are admissible against the other alleged co-conspirators (*U. S.* v. *Hall*, 2d cir., 178 F. 2d 853; *Krulewitch* v. *U. S.*, 336 U. S. 440), and in the use of the plea of guilty to prove the overt act (R. 281a).

(b) The decision of the Court of Appeals in the case at bar holding "that Mauro's plea was received for its bearing on Mauro's credibility as a witness, which was proper, even on direct examination" is a departure from the accepted and usual course of procedure regardless of whether the pleas were received to impeach or confirm Mauro's credibility. In the former case there would be a departure from the accepted and the usual course of pro-

cedure which forbids the party on whose behalf a witness appears to impeach his credibility by proof of bad character. (3 *Wigmore on Evidence* (3d ed.) Secs. 896,900; *Choctaw & M. R. Co.* v. *Newton,* (8th cir.) 140 F. 225, 250). In the latter case there would be a departure from the accepted and usual course of procedure which follows the rule that a witness may not be corroborated or have his sworn testimony reinforced by proof that on previous occasions he has made statements consistent with his present testimony. (4 *Wigmore on Evidence,* (3d ed.) Sec. 1124; *Mellon* v. *U. S.* (5 cir.) 170 F. 2d, 583, 585-6).

II.

The decision of the Court below holds that when a character witness for the defendant is asked upon his direct examination: "Can you tell us what his reputation is?" (R. 71a), he may be cross-examined as to the defendant's reputation for the period subsequent to the terminal date of the alleged crime committed. He may then be asked, as here, "Have (you) ever heard that on June 30, 1954 * * * this defendant * * * was arrested in this court * * * for a conspiracy to violate the narcotics laws?" (R. 73a).

This decision represents a departure from well established and hithertofore unquestioned rules governing the questioning of character witnesses (5 *Wigmore on Evidence,* (3d ed.) Sec. 1618; 1 *Wharton's Criminal Evidence,* Sec. 331; *Spurr* v. *U. S.* (6th cir.) 87 F. 701; *Minkow* v. *U. S.* (4th cir.) 5 F. 2d 319). It substantially curtails the defendant's rights with respect to the calling of character witnesses and places a dangerous weapon in the hands of prosecutors by which they can destroy at will the reputation of any defendant by simply making an arrest for a heinous offense.

That the point is not academic is shown by what happened in the case at bar. The petitioner was indicted sub-

sequent to his arrest for the crimes herein charged for a conspiracy to violate the narcotics laws. This indictment was obtained by the same authority prosecuting the petitioner in the case at bar and was handed down by the same grand jury which handed down the indictment herein.

Whether these methods are proper is an important question affecting the right to a fair trial of all defendants and prospective defendants in the federal courts, and has not been, but ought to be, settled by this court.

III.

The decision of the Court below in the instant case is directly in conflict with the decision of the Fifth Circuit Court of Appeals in *Babb* v. *U. S.*, 218 F. 2d 538, 541, decided January 12, 1955.

In the instant case it has been held by the Second Circuit Court of Appeals that it was not error to permit Mauro, a co-defendant and alleged co-conspirator, when called as a witness by the Government, to testify, over objection, that he had pleaded guilty to the conspiracy charged in the indictment (App. A., *infra*, p. 5a).

On the other hand, in *Babb* v. *U. S.*, *supra*, it was held that it was error to permit a co-defendant and alleged co-conspirator, when called as a witness by the Government, to testify over objection that he had pleaded guilty to the indictment.

IV.

Clearly, all of the questions presented are of importance in the administration of the federal criminal laws. What was done in the case at bar can be done in virtually every criminal conspiracy case and in every case where character witnesses are called by the defendant. Under the rulings here matters gravely prejudicial were conveyed to the

jury. If this decision is not corrected by this Court, the practices followed here can be expected to continue with the greatest frequency. For that reason settlement of these questions, both in the interest of law enforcement and fair trial, is urgently required.

V.

The decision of the Court below is believed to be erroneous. The admissibility of Mauro's guilty plea for its bearing on his credibility, even on direct examination, is patently erroneous. One cannot make evidence admissible by creating an exception to a rule when the ground of the exception is itself untenable. Since it is error to impeach or support by prior consistent statements the credibility of a party's own witness, such impeachment or support cannot provide the ground for admitting pleas of guilty of co-defendants and co-conspirators.

The ruling of the Court of Appeals that, if the direct examination of character witnesses does not limit the inquiry as to the defendant's reputation to the period up to but not beyond the date of the crime charged, the door is opened for cross-examination for the period subsequent to the date of the crime charged, is also erroneous. It is well settled that the defendant's reputation after the commission of the crime has no bearing or relevance as to his guilt or innocence of that charge. If a question on direct examination is too broad, so much of it as relates to the post crime period must be disregarded as irrelevant. Introduction of irrelevant evidence on the direct examination does not open the door to further irrelevant matter on cross-examination. The remedy of the Government was to object to the witnesses on direct examination testifying to the defendant's reputation except for the period up to the date of the crime charged. By failing to object, by not moving to strike such irrelevant evidence, by not request-

ing an appropriate charge from the Court, the Government did not acquire the right to cross-examine with respect to irrelevant evidence elicited on direct examination and bring out, with all its obvious prejudice, that the defendant had been arrested and indicted for conspiracy to violate the narcotics laws. With the well-merited bias in the minds of the public against such offenses, one cannot deny its great detrimental effect on the petitioner's right to a fair trial without bias and prejudice on the part of the jury.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD TOMPKINS,
Counsel for Petitioner.

September 1, 1955.

APPENDIX A

Opinion of the Second Circuit Court of Appeals in the Case at Bar.

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 336 October Term, 1954

Argued June 9, 1955 Decided July 5, 1955

DOCKET No. 23549

UNITED STATES OF AMERICA,

Appellee,

against

PASQUALE PAGANO,

Defendant-Appellant.

Before CHASE and MEDINA, Circuit Judges, and RYAN, District Judge.

Appeal from the United States District Court for the Southern District of New York, Lawrence E. Walsh, Judge.

Defendant appeals from a judgment of conviction and sentence for conspiring to bribe a government official in violation of 18 U. S. C. § 371 and for offering and paying such bribe in violation of 18 U. S. C. § 201. Affirmed.

Appendix A.

J. Edward Lumbard, United States Attorney for the Southern District of New York, New York City, N. Y. (Dennis C. Mahoney, Assistant United States Attorney, New York City, N. Y., of Counsel), for appellee.

Bernard Tompkins, New York City, N. Y. (Vincent J. Velella, New York City, N. Y., of Counsel), for defendant-appellant.

Medina, Circuit Judge:

This case involves another one of those cumulative sentences which we have so often criticized, but which we have no power to reverse in the absence of a finding of error in the conduct of the trial. *United States* v. *Chiarella,* 184 F. 2d 903, 911 (CA 2, 1950). Count IV of the indictment charges appellant, one Mauro and others with conspiracy, during the period from June 1 through June 23, 1954, to offer a bribe and to bribe an Internal Revenue employee; Count II charges appellant with the substantive offense of offering a bribe on June 22, 1954; and Count III charges appellant and Mauro with the substantive offense of paying a bribe on June 23, 1954. Mauro pleaded guilty and testified for the government. The jury found appellant guilty on all counts, and the court imposed the maximum sentence of five years for the conspiracy and two maximum sentences of three years each on the substantive charges, to run concurrently, or eight years in all. As will appear shortly, "the counts are merely variants of a single criminal transaction"; and these cumulative sentences have been imposed in the very teeth of our repeated admonitions. We are accordingly required to direct a new trial, "unless the whole trial was conducted with the most

scrupulous exactness." *Amendola* v. *United States,* 17 F. 2d 529, 530 (CCA 2nd, 1927).

In May of 1954 Frank P. McSweeney, who died before the trial, was a Special Agent of the Intelligence Division of the Internal Revenue Service, and his superiors assigned him to investigate the income tax liability of appellant, then a business agent for Mason Tenders Local No. 59, International Hod Carriers Union, A. F. of L. Having received a letter asking him to appear at the offices of the Internal Revenue Service at 253 Broadway, New York City, appellant went there on June 1, 1954 and was questioned by McSweeney. When the questions turned to certain trips to Europe in 1951 appellant terminated the interview and left. Shortly thereafter, according to appellant's testimony he mentioned his "problem" to his uncle John Pagano and to his uncle's friend Puppy, who recalled that Mauro, who was in fact a file clerk in the Internal Revenue Service at 253 Broadway, "works for the Internal Revenue." The upshot was that the three, appellant, the uncle and Puppy, met Mauro on Third Avenue and 116th Street in New York City, where Puppy introduced Mauro to the others and Mauro was shown the letter requesting appellant's appearance and he promised to get in touch with McSweeney, which he did.

On June 22, 1954, appellant had a conversation with McSweeney in conference room 317 at the office of the Internal Revenue Intelligence Division at 253 Broadway. Inspector John J. O'Neill and Inspector Howard T. Moran, having installed a listening device, were in the next room, and each of them testified that, after certain preliminary observations about the information appellant would be required to furnish relative to his net worth and his trips to Europe, appellant "told McSweeney that he had $500 for him to fix the case, $300 of which would be delivered by Mauro the following day, June 23rd, and $200 * * * within two weeks." The next day Mauro delivered to McSweeney

an envelope containing $300 in cash, whereupon he, and later appellant, were arrested and indicted.

There was thus ample evidence to justify the submission of all three counts to the jury. Indeed, the record as a whole quite plainly indicates appellant's guilt. The mere fact that Mauro toned down some of his testimony, and denied that appellant authorized him to give any money to McSweeney, is of no consequence. With the testimony of the two inspectors and the uncontradicted evidence of the delivery of the money to McSweeney as a foundation, the jury was fully justified in fitting the other aspects of the case, including the testimony of Mauro and appellant concerning the various meetings at the corner of Third Avenue and 116th Street, into the pattern of a conspiracy to bribe an Internal Revenue Agent, and in finding that there was both an offer to bribe and the payment of a bribe.

Nor is there any merit in the contention that "it was irrefutably established that on or before June 16th no conspiracy to bribe McSweeney was in existence." A conversation between Mauro and McSweeney on June 16th is alleged in the indictment as an overt act, and the argument is that Mauro's testimony indicates that at that time he had no idea of bribing McSweeney and hence the jury were permitted to find conspiracy on the basis of an alleged overt act which occurred before the conspiracy was formed. But the jury may not have believed this particular part of Mauro's testimony and it does not require an especially acute intelligence to probe through this more or less natural disclaimer and to give weight to the fact that Mauro, a file clerk in the Internal Revenue Service, with no background of personal acquaintance with appellant, should have been selected to go to see McSweeney, that the meetings were held in the street, near Mauro's home, and that Mauro is the man who turned up with the money just as appellant said he would. It is elementary that no direct proof of agreement is essential in these conspiracy cases

and that the evidence taken as a whole is the proper basis for the drawing of the necessary inferences. The jury were warranted in finding that the conspiracy was already formed and in operation at the time of Mauro's first visit to McSweeney. Moreover, the court instructed the jury that the question of appellant's participation in any conspiracy must be decided on the basis of what appellant himself did and said, and that the jury could properly consider the declarations and acts of Mauro only after they had first found that there was a conspiracy and that appellant was a participant therein.

In fact the charge was conspicuously clear and in all respects accurate. Couched in language which laymen might easily understand, rather than in words culled from the opinions of appellate courts, which, torn from their context, often form a confusing amalgam, the instructions covered each and every issue with complete fairness and impartiality. The scales were held precisely in balance.

It is claimed that appellant was deprived of a fair trial by numerous rulings which are said to present a series of errors. We shall examine them in the order in which they are argued in appellant's brief:

(1) Mauro was permitted to testify on direct examination, over objection, that he had pleaded guilty to the conspiracy charge; and we are told that the prosecutor's statement in summation, asking the jury "in considering and evaluating the effect of his (Mauro's) testimony to keep in mind that he had pleaded guilty to the conspiracy charge", was in effect an argument that Mauro's plea of guilty was some evidence of appellant's guilt. But the record makes it clear that Mauro's plea was received for its bearing on Mauro's credibility as a witness, which was proper, even on direct examination; such was the purport of the prosecutor's comment on summation; and the trial judge specifically warned the jury against considering

Mauro's plea of guilty as in any sense proof of appellant's guilt.

(2) It is claimed that questions addressed to appellant's character witnesses relative to his arrest in New Jersey on April 22, 1952, for atrocious assault and to his indictment in the Southern District of New York on July 30, 1954, for conspiracy to violate the narcotics laws, "were drummed into the minds of the jurors by repeated propounding to every one of these six witnesses." But a closer scrutiny of the sequence of events makes it quite clear that, within the Supreme Court ruling in *Michelson* v. *United States,* 335 U. S. 469 (1948), there was no abuse of discretion.

The questions addressed to the first character witness were obviously proper. This witness testified on direct examination that he had "never" heard anything bad about appellant. The cross-examination, omitting counsel's elaborate objections and argument, covered less than one-half page of the printed record. Thereafter appellant's counsel chose to take the initiative by introducing the subject of arrests as part of his direct examination of the next five character witnesses. It was under these circumstances that the prosecutor pursued the subject and elicited the fact, as testified by at least one of the character witnesses, that the arrest on the narcotics charge was "general knowledge" in the community, and that the witness also knew of the prior arrest in New Jersey, but nevertheless insisted that these were mere accusations which did not affect his testimony that appellant's reputation was good.

The following instruction to the jury on this subject is without a flaw:

> "The fact that a defendant has been arrested or indicted for other crimes is in itself no proof whatever of his guilt in this case, and it is not to be con-

sidered as such. It goes to how much weight you want to give to the testimony of the character witnesses."

There is nothing in the claim that *Michelson, supra,* requires that some such instructions be given at the time the evidence was received. Moreover, had counsel made a request that such an instruction be given when the subject of these arrests was first brought into the case, there is no reason to suppose that the trial judge would have refused to accede to the request.

(3) In order to consider the propriety of certain rulings made during the cross-examination of appellant and a further contention relative to a comment made by the prosecutor during his summation, it is essential to understand the nature of appellant's interrogation on direct examination by his own counsel. Without making too long a story of it, appellant testified at length on the subject of his service in the Marines in World War II, enumerating all the various medals he had received, describing himself as among "the unsung heroes," as engaged in "suicide work" and as having been "stabbed" in combat overseas; he testified that he lived with his wife and supported his family; and he went into the subject of his income and his financial resources at great length, describing himself as a working man of extremely modest means, with a keen interest in the labor movement and total earnings of only $411 in the year 1951, for which he had filed no income tax return.

It will be recalled that what led to the bribery in the beginning was a series of questions put to appellant at his first interview with McSweeney on the subject of certain trips to Europe made by appellant in 1951. When this subject came up appellant abruptly terminated the interview and left the room. Consequently, it is fair to infer that his elaborate testimony about his wife and family and his modest means and small earnings was designed to give the

jury the impression that such a man could have no income tax problem and that the so-called investigation was part of a shake-down by McSweeney or an entrapment by the government agents, which in some way unbeknown to appellant, led uncle John Pagano and his friend Puppy to send Mauro down with the money. There are broad hints to this effect in the summation of appellant's counsel.

In any event, the prosecutor could hardly be expected to refrain from attempting on cross-examination and on summation to destroy this picture of appellant as a steady family man with the income of a bricklayer. The cross-examination of the trips to Europe in 1951 was devastating, especially that relating to the second trip without his wife; and the explanation of where the money came from probably left an indelible impression on the minds of the jurors.

It is in this setting that the trial judge permitted the prosecutor, over objection, to ask appellant on cross-examination, whether or not he had registered and stayed at a hotel in Florida in 1954 with a woman other than his wife. This was not for the purpose of disclosing mere immorality; it served to demolish the claims appellant had voluntarily asserted on his direct examination.

Moreover, the trial judge in his instructions to the jury mentioned the fact that on cross-examination appellant "gave lengthy testimony going into particulars about various events in his life," and he cautioned the jury that this testimony had a bearing solely on the question of appellant's credibility as a witness.

(4) Building upon the foundation laid on appellant's direct examination his counsel in summation, not once but repeatedly, described appellant as in "hand to hand combat with the enemy," "stabbed, wounded in action," "he left his blood in a foreign country," and so on.

When the prosecutor's turn came he reviewed the evidence in a matter of fact fashion, quite free from oratory

and declaration; and, in the course of his summation, he made the following statement:

> "Ladies and gentlemen of the jury, you know from your own experience, and I know from mine, that when any soldier is in combat and is wounded in combat he receives the Order of the Purple Heart, and this defendant did not receive the Order of the Purple Heart, and this defendant was not wounded in combat.
>
> I take nothing away from this defendant for his loyal and faithful service to the Government in combat. May I say to you that he should be commended for that, as all who have served in the Armed Forces during war should be commended, and I am the first to commend him for it."

There was nothing inflammatory about this. The prosecutor was not claiming that he knew of his own knowledge that appellant had not been wounded in action. Appellant had testified to what he described as his medals and citations, and they did not include the Order of the Purple Heart. It was fair argument from this that he had not been wounded; and one of the principal questions in the case was that of appellant's credibility.

In any event, no objection was made during or at the close of the summation on behalf of the government, nor was any motion made for a mistrial. But the following day appellant's counsel requested the court to reopen the case for the purpose of receiving the testimony of alleged eye-witnesses "who were on the battlefield when he was wounded." This motion was properly denied.

As the trial was conducted throughout with a scrupulous regard for the protection of appellant's rights and as the record is wholly free from error, we are constrained with some reluctance to affirm the judgment.

Affirmed.

Appendix A.

Judgment

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 5th day of July one thousand nine hundred and fifty-five.

Present: HON. HARRIE B. CHASE,
HON. HAROLD R. MEDINA,
Circuit Judges,
HON. SYLVESTER J. RYAN,
District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PASQUALE PAGANO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

/s/ A. DANIEL FUSARO,
Clerk.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	13

CITATIONS

Cases:

Babb v. *United States*, 218 F. 2d 538	8
Grunberg v. *United States*, 145 Fed. 81	9
Kelling v. *United States*, 121 F. 2d 428	8
Michelson v. *United States*, 335 U.S. 469	11, 12
Minkow v. *United States*, 5 F. 2d 319	12
Richards v. *United States*, 193 F. 2d 554, certiorari denied *sub nom.* *Krupnick* v. *United States*, 343 U.S. 930	9
United States v. *Falcone*, 109 F. 2d 579, affirmed, 311 U.S. 205	8
United States v. *Hall*, 178 F. 2d 853	8
United States v. *Hartenfeld*, 113 F. 2d 359, certiorari denied, 311 U.S. 647	8
United States v. *Rollnick*, 91 F. 2d 911	10
United States v. *Toner*, 173 F. 2d 140	8

Statutes:

18 U.S.C. 201	2
18 U.S.C. 371	3

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 369

PASQUALE PAGANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1-9) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 5, 1955 (Pet. App. 10). An order by Mr. Justice Harlan on August 3, 1955, extended the time for filing a petition for a writ of certiorari to and including September 2, and the petition was filed on September 1, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper to permit a co-conspirator to testify as a prosecution witness that he had pleaded guilty to the conspiracy charge, where the court instructed that this plea could not be considered as proof of the petitioner's guilt.

2. Whether, after character witnesses had testified at length on direct examination that petitioner's reputation for truthfulness was good up to the time of trial, the prosecution was properly allowed to cross-examine them as to petitioner's arrest on a narcotic violation charge about one week subsequent to the crime for which he was on trial.

STATUTES INVOLVED

18 U.S.C. 201 provides:

> Whoever promises, offers, or gives any money or thing of value * * * to any officer or employee or person acting for or on behalf of the United States, or any department or agency thereof, in any official function, under or by authority of any such department or agency * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any

act in violation of his lawful duty, shall be fined not more than three times the amount of such money or value of such thing or imprisoned not more than three years, or both.

18 U.S.C. 371 provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * *

STATEMENT

Count IV of an indictment returned in the United States District Court for the Southern District of New York charged petitioner, one Mauro, and others with a conspiracy under 18 U.S.C. 371 to offer a bribe to and to bribe an Internal Revenue official (R. I, 4).[1] Count II charged petitioner with offering a bribe, and Count III charged petitioner and Mauro with paying a bribe, in violation of 18 U.S.C. 201 (R. I, 3-4). Mauro pleaded guilty to Counts I, III, and IV and later Counts I and III were dismissed as to him (R. I, 2, 16). Petitioner was tried alone, found guilty by the jury, and sentenced to imprisonment for five years under Count

[1] The record is in two volumes, which will be referred to as "R. I" and "R. II".

IV, to run consecutively with concurrent terms for three years under each of Counts II and III (R. I, 325, 331). On appeal the judgment was unanimously affirmed (Pet. App. 10).

The evidence adduced at the trial may be summarized in pertinent part as follows:

Internal Revenue agent McSweeney, who died prior to the trial, had been assigned in May 1954 to an investigation of petitioner's alleged income tax liability (R. I, 13, 14). A letter dated May 25, 1954 (Gov. Ex. 3) from McSweeney to petitioner requested the latter to appear at the Internal Revenue office regarding this investigation (R. II, 20; R. I, 135-136). Petitioner went to this office on June 1, 1954, and gave a sworn statement, answering questions propounded by agent McSweeney (Gov. Ex. 1, R. II, 13-19). Petitioner stated that he spent about $3,000 on a trip to Europe in 1951 with his wife and son, but when asked if he had taken any other trips, he "got up and walked out of the room," and the "conference was discontinued" (R. II, 18-19).

A day or two later, according to petitioner's testimony, he mentioned his "problem" to his uncle John Pagano, and a man named Puppy. Puppy said that he knew Mauro, who worked for Internal Revenue and might be able to help petitioner. (R. I, 160-161.)

Mauro testified that a few weeks before June 23, 1954, Puppy introduced him to petitioner on the corner of Third Avenue and 116th Street in the presence of John Pagano, gave him the tax letter

and asked him to call McSweeney about the matter. Mauro promised he would do so (R.I, 17-18, 20-21). After Mauro's first meeting with McSweeney, the latter stated, "You know, it is worth $5,000." When Mauro conveyed this information, petitioner stated that this was ridiculous, and that Mauro should tell McSweeney to forget about it. (R. I, 32-33.) Later, Mauro, on the same street corner in the presence of Puppy, informed petitioner that McSweeney wanted to see him at the Internal Revenue office, and petitioner stated he would go there (R. I, 23, 25). Mauro phoned McSweeney to say that petitioner had promised to come to see him (R. I, 26).

On the afternoon of June 22, 1954, two Treasury Department inspectors stationed themselves with a listening device and tape recorder in a room adjoining that in which agent McSweeney and petitioner were having a conference (R. I, 43-44, 53). They overheard petitioner telling McSweeney that he "had $500 for him [McSweeney] to fix the case, $300 of which would be delivered by Mauro the following day, June 23rd, and $200 * * * within two weeks" (R. I, 45, 54). On the night of June 22, at the same street corner and in the presence of John Pagano, Puppy told Mauro, "Here, this is an envelope with $300 in it; bring it down to Mr. McSweeney. $200 more will follow" (R. I, 27-30, 34, 38-39). On June 23, the day Mauro was arrested, he delivered the $300 in the envelope to McSweeney, who had asked, "Do you have that money for me?"

McSweeney then counted the money in Mauro's presence (R. I, 26-27, 30-31, 39).

On cross-examination by defense counsel, Mauro testified that at no time did petitioner give him money to be passed to McSweeney, or authorize him to give any money to McSweeney (R. I, 32, 36). Mauro's testimony was that petitioner merely said, "Ask Mr. McSweeney if he could help me in any way" (R. I, 36).

Petitioner testified, denying categorically that he ever had the conversation with McSweeney to the effect that he would send Mauro with a $300 payment, with $200 to follow later (R. I, 173, 212). He testified that he sent Mauro merely to learn the nature of the difficulty regarding his income tax forms (R. I, 159), and that McSweeney threatened him (petitioner) with a jail sentence unless he would "straighten out" his tax problem (R. I, 141-143, 119-120).

Five witnesses testified as to petitioner's good reputation for honesty and truthfulness. The first character witness, Barba, testified on direct examination that he had "never heard anything bad about [petitioner]." On cross-examination, this witness was asked, over petitioner's objection, whether he had heard that on June 30, 1954, petitioner was arrested for a conspiracy to violate the narcotic laws, and answered that he had not heard this. (R. I, 73-74.) Thereafter petitioner's counsel on direct examination, in addition to asking the question about whether the witnesses had ever heard anything bad about petitioner, inquired

whether arrests of the petitioner accusing him of other crimes would change their opinions as to his reputation and character. The answers were in the negative. (R. I, 77, 84, 94, 101, 102.) Then on cross-examination the prosecutor, over objection, asked about petitioner's arrest for the 1954 narcotic law charge. Two witnesses testified they had not heard of this (R. I, 78-79, 95-96); one that he had heard a rumor to this effect (R. I, 90-91); and another, that this was "general knowledge in the community" (R. I, 114).

ARGUMENT

1. On the direct examination of Mauro as a government witness, he testified over petitioner's general objection that he had already pleaded guilty to the conspiracy charge in the indictment (R. I, 16). Petitioner contends that introduction of this evidence was error, since this testimony made it improbable that the jury would credit his virtual denial that a conspiracy existed.[2] In effect, he

[2] Even though, as the court below observed (Pet. App. 4), Mauro did "tone down" some of his testimony on cross-examination, his testimony clearly was not tantamount to a denial that a conspiracy ever existed. Mauro admitted his various meetings with the co-conspirators on the street corner; that he knew there was $300 in the envelope received from Puppy; and that he did deliver the $300 to McSweeney saying, "Here's the $300 from that Pat Pagano case thing, from the letter, in regards to the letter" (R. I, 17, 25, 27-29, 38-39). Although he did deny that petitioner gave him money or authorized him to pass money to McSweeney (R. I, 32, 36), this was not inconsistent with his direct testimony that Puppy gave him the $300 in the presence of John Pagano (R. I, 27-30, 34, 38-39). The jury had the right to infer that Puppy was not acting without the knowledge of petitioner.

argues that the jury must have improperly considered that Mauro's plea of guilty tended also to prove petitioner's guilt (Pet. 5, 7-8).

It is common practice for prosecuting attorneys, in using testimony of accomplice witnesses, to bring before the jury the fact of a prior plea of guilty by such accomplice, rather than have the matter developed on cross-examination with possible, unfavorable innuendoes. The courts have held, in cases relied upon by petitioner, that where this is done, a defendant is entitled upon request to an instruction that the plea by the witness should not be considered as evidence of the guilt of the defendant on trial. *Babb* v. *United States,* 218 F. 2d 538, 541-542 (C.A. 5); *United States* v. *Hall,* 178 F. 2d 853 (C.A. 2).[3] But, where, as in this case, the jury has been properly instructed,[4] the fact that the witness is allowed to testify as to his prior plea has been held not to constitute error. *United States* v. *Falcone,* 109 F. 2d 579, 582 (C.A. 2), affirmed, 311 U.S. 205; *Kelling* v. *United States,* 121 F. 2d 428 (C.A. 8); *United States* v. *Hartenfeld,*

---

[3] In *United States* v. *Toner,* 173 F. 2d 140, 142 (C.A. 3), the court erroneously charged that the jury could "take into consideration that one of two co-conspirators did plead guilty and make such use of it as they see fit", thereby dissipating the preceding part of the charge.

[4] The court in its final charge said (R. I, 318):

"Now I will add one thing while I am thinking about Mauro. The fact that a person has pleaded guilty to one of the charges in this indictment is in no sense proof of the guilt or innocence of the other person. Of course, a plea of guilty by one man does not prove that somebody else is guilty, and you are not to take that into account in any way in your deliberations."

113 F. 2d 359, 362 (C.A. 7), certiorari denied, 311 U.S. 647; *Grunberg* v. *United States,* 145 Fed. 81, 86 (C.A. 1). See also *Richards* v. *United States,* 193 F. 2d 554, 556 (C.A. 10), certiorari denied *sub nom. Krupnick* v. *United States,* 343 U.S. 930, where similar testimony was held not to constitute error although no instruction was requested or given.

Moreover, defense counsel on cross-examination, in order to impeach Mauro's credibility, made an unsuccessful attempt to extract an admission that Mauro had been promised leniency or special consideration for becoming a government witness (R. I, 35). Then in his final argument to the jury, counsel after alluding to Mauro's guilty plea to the conspiracy count and dismissal by the Government of the substantive counts against him, expressly stated, "We want you to know it happened that way" (R. I, 249). Later in the summation, counsel remarked that the jury could reasonably assume that Mauro as a former government employee was told that, if he would be a government witness, he would obtain favorable consideration for making a statement as to his guilt (R. I, 251-252); and that Mauro "got some special consideration when the counts were dismissed against him," and had reason "to lie as far as the Government's case is concerned" (R. I, 254). The above facts in context evince deliberate initiative by defense counsel to emphasize Mauro's guilty plea as affecting his credibility. In view of the use of the information made by petitioner, he cannot properly com-

plain of its introduction in evidence. *United States* v. *Rollnick,* 91 F. 2d 911, 917 (C.A. 2).

In this setting it was entirely proper for the prosecutor later to ask the jury in his closing argument, "in considering and evaluating the effect of [Mauro's] testimony to keep in mind that he had pleaded guilty to this conspiracy charge" (R. I, 281). The court, moreover, in its final charge gave an unchallenged and correct instruction to the effect that the jury could take into account the fact that Mauro as an accomplice might be hoping for leniency as a result of his testimony (R. I, 317).

2. There is no merit to petitioner's contention (Pet. 10-11) that the trial court erred in permitting cross-examination of petitioner's character witnesses as to whether they had heard that on June 30, 1954—about one week subsequent to the bribe in the instant case—the petitioner had been arrested for a conspiracy to violate the narcotic laws (see Statement, *supra,* pp. 6-7, for the facts regarding this matter).

It should be noted that, in the direct examination of each character witness, he testified that he had "never" heard anything bad about petitioner (R. I, 73, 77, 84, 94, 102). The entire scope of the direct examination of these witnesses shows that it related to petitioner's reputation for honesty and truthfulness up to the time of the trial—a fact which petitioner concedes (Pet. 10). Petitioner's counsel, moreover, in his closing argument, after referring to the propriety of the character witness testimony, stated, "We didn't try to conceal any-

thing here. The whole thing was thrown open to you" (R. I, 267). Petitioner's afterthought, urged here for the first time with no supporting authorities, to the effect that the prosecution, by failing to object to the direct examination testimony as to petitioner's reputation during the post crime period,[5] forfeited the right of cross-examination in regard to this (Pet. 10-11), is without substance.

The prosecutor's cross-examination regarding the narcotic law arrest was proper within the rationale of *Michelson* v. *United States,* 335 U.S. 469, 472, which requires (1) that the questions be founded on fact, and (2) that the jury be advised of the limited purpose of the inquiry. This questioning was concededly grounded upon actual fact, since petitioner admitted the arrest for conspiracy to violate the narcotic laws (R. I, 175). The court's charge, to which no objection was made, complied with the other requirement as to advising the jury of the limited purpose of the inquiry (R. I, 318):

> In the cross examination of the character witnesses and in the cross examination of the defendant himself there were references to an arrest and an indictment for a crime other than

---

[5] Even though the narcotic charge arrest occurred on June 30, 1954, or several days after the bribe, the narcotic violation occurred in LeHarve, France, in 1951—about three years prior to the crime in the instant case. Petitioner, moreover, was permitted to deny that he had been in LeHarve at that time, and his counsel commented upon this denial in his closing argument (R. I, 175, 232, 272).

> that here on trial. Now, when character witnesses testify, they testify to the reputation of the defendant, and it is proper to cross examine them as to whether they know about arrests or indictments to see what they know about the defendant's reputation, and to see what they take into account when they evaluate a man's reputation, and that is why that cross examination was permitted.
>
> The fact that a defendant has been arrested or indicted for other crimes is in itself no proof whatever of his guilt in this case, and it is not to be considered as such. It goes to how much weight you want to give to the testimony of the character witnesses.

As this Court stated in *Michelson* (335 U.S. at 479), "The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." Since petitioner's character witnesses had broadly portrayed his good reputation for honesty and truthfulness up to the time of trial, basic fairness dictated that the prosecutor should be permitted to cross-examine them as to petitioner's arrest and indictment on the narcotic charge.[6]

---

[6] In *Minkow* v. *United States*, 5 F. 2d 319, 320 (C.A. 4) (see Pet. 8), neither of the accused took the stand, and the court left open the question as to what its ruling would have been if they had testified. This is distinguishable from the instant case, where the accused did take the stand.

CONCLUSION

The decision below is correct, and there is no conflict of decisions in the Courts of Appeals. It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

SEPTEMBER 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 930691 987